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Nos. 91-261 and 91-274

In the Supreme Court of the United States

OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, PETITIONER

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC., PETITIONERS

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION OF THE UNITED STATES FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

AND

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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The Solicitor General, on behalf of the United States as amicus curiae, respectfully moves for leave

to file the attached supplemental brief discussing the effect on this case of Executive Order No. 12,818, which was issued by the President on October 23, 1992. See 57 Fed. Reg. 48,713 (1992).

This case presents the question whether the doctrine of implied preemption under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, prohibits a state agency, acting in its proprietary capacity, from implementing an agreement that requires all contractors performing work on a construction project undertaken by the agency to adhere to a collective bargaining agreement that establishes labor terms and union recognition for the project as a whole. Executive Order No. 12,818 addresses the use of such project labor agreements in connection with construction contracts awarded by federal agencies, and with non-federal construction projects that are funded by federal grants and cooperative agreements. The Boston Harbor clean-up project at issue in this case receives federal financial assistance from the Environmental Protection Agency pursuant to Titles II and VI of the Federal Water Pollution Control Act (the Clean Water Act), 33 U.S.C. 1281 *et seq.* and 1381 *et seq.* We request leave to file the attached supplemental brief to inform the Court of the United States' position regarding the effect of the Executive Order on the Boston Harbor project.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY M. HUNTER
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National Labor Relations Board

NOVEMBER 1992

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by the President on October 23, 1992. See 57 Fed. Reg. 48,713 (1992).

This case presents the question whether the doctrine of implied preemption under the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, prohibits a state agency, acting in a proprietary capacity, from implementing an agreement that requires all contractors performing work on a construction project undertaken by the agency to adhere to a collective bargaining agreement that establishes labor terms and union recognition for the project as a whole. Executive Order No. 12,818 addresses the use of such project labor agreements in connection with construction contracts awarded by federal agencies and construction contracts funded by federal grants and cooperative agreements.

1. Section 1(a) of Executive Order No. 12,818 provides that, to the extent permitted by law, before any federal agency may award a construction contract, it must ensure that the bid specifications, project agreements and other controlling documents of the agency and its contractors and construction managers do not, *inter alia*, require bidders, contractors or subcontractors to enter into or adhere to agreements with one or more labor organizations on the same construction project or any other project. Section 1(a) also provides that the agency may not require any bidder, contractor or subcontractor to enter into, adhere to, or enforce an agreement that requires its employees, as a condition of employment, to become members of or affiliated with a labor organization.

Section 2(a) of the Executive Order directs the heads of executive agencies, within 30 days of the issuance of the Order (*i.e.*, by November 22, 1992), to identify statutes under their jurisdiction that provide authority to condition a grant award or cooperative agreement on the recipient's or non-federal party's agreement that the bid specifications, project agreements, and other controlling documents pertaining to the grant or cooperative agreement will not contain any of the elements that Section 1(a) does not permit on federal construction projects. Section 2(b) then directs the agency heads to exercise any statutory authority they have identified, to the extent consistent with law, so as to preclude the grant recipient or party to a cooperative agreement from imposing any of those elements. However, the latter directive applies only prospectively—to grants awarded or cooperative agreements entered into after the date the agency has exercised the identified statutory authority to impose the conditions.

2. The Boston Harbor clean-up project has received federal financial assistance from the Environmental Protection Agency (EPA) pursuant to Titles II and VI of the Federal Water Pollution Control Act (the Clean Water Act), 33 U.S.C. 1281 *et seq.* (grants for construction or treatment works), 1381 *et seq.* (state water pollution control revolving funds). For example, in the appropriations act for EPA for fiscal year 1993, Congress expressly appropriated $100 million for grants for the Boston Harbor project pursuant to Title II of the Clean Water Act.[1]

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[1] Congress appropriated a total of $305,500,000 "for making grants under title II of the Federal Water Pollution Control

We have been informed by EPA that it has determined that the Clean Water Act permits it to condition grants or cooperative agreements on the recipient's or non-federal party's acceptance of the limitations specified in Section 1(a) of Executive Order No. 12,818. Nevertheless, it appears that the Executive Order will not have any impact on the Boston Harbor project at this time. Under Section 2(b), the Executive Order's restrictions do not apply to grants made prior to the time the agency head has identified the agency's statutory grant authorities that permit it to impose the specified conditions. As a result, any grants made to the Massachusetts Water Resources Authority (MWRA) during fiscal year 1992 or in prior years are unaffected by the Executive Order.

Act * * * to the appropriate instrumentality for the purpose of constructing secondary sewage treatment facilities to serve the following localities, and in the amounts indicated: Boston, Massachusetts, $100,000,000; * * * ." Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1993, Pub. L. No. 102-389, Tit. III, 106 Stat. 1599-1600. For fiscal year 1992, Congress likewise appropriated $100 million specifically for the Boston Harbor project. Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1992, Pub. L. No. 102-139, Tit. III, 105 Stat. 764. In addition, EPA has informed us that from 1991 to the present, it has made State Revolving Fund (SRF) loans for the Boston Harbor project totalling $73.2 million, and that it anticipates making new SRF loans totalling $100 million during fiscal year 1993.

On the other hand, any *new* grants made by EPA to MWRA from this time forward—including the $100 million specified in the 1993 appropriations act—will be subject to the Executive Order.[2] However, Section 1(c) of the Order states that "[c]ontracts awarded before the effective date of this order [October 23, 1992], and subcontracts awarded pursuant to such contracts, whenever awarded, shall not be governed by this order." By virtue of this provision, any contracts awarded by MWRA prior to October 23, 1992 (and any subcontracts, whenever awarded, under such contracts) will be unaffected by the Executive Order, even if work performed under those contracts or subcontracts is funded by future grants made by EPA to MWRA. We understand that MWRA has entered into a number of long-term contracts that are covered by this grandfather provision. See Pet. Supp. Br. 4. If MWRA allocates to those existing contracts and subcontracts the $100 million it will receive pursuant to the 1993 appropriations act, the conditions in Executive Order No. 12,818 will not be triggered. EPA has no obligation to make similar

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[2] EPA's regulations, which are similar to those of other granting agencies, provide that "[w]hen procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds." 40 C.F.R. 31.36(a). However, the regulations further provide that "[t]he State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations." *Ibid.* We have been informed by EPA that by virtue of the latter provision, no amendment of its regulations is necessary for EPA to give effect to Executive Order No. 12,818 in connection with grants it awards.

grants to MWRA after fiscal year 1993. But if it does, the Executive Order's restrictions will be triggered only if (and to the extent) the funds are applied to work under contracts awarded on or after October 23, 1992.

For the foregoing reason, we agree with petitioners (Pet. Supp. Br. 4) that Executive Order No. 12,818 does not have any immediate impact on the Boston Harbor project, and the nature of any such impact it may have in the future is speculative. Respondents, in their supplemental brief, do not contend otherwise.

3. Respondents do assert, however, that the Executive Order contradicts one of the "central contentions" in our amicus brief—which, according to respondents, is that "governmentally imposed union-only project agreements 'further substantial public purposes.'" Resp. Supp. Br. 1-2 (quoting U.S. Amicus Br. 29). Respondents' quotation of our submission is selective. The section of our brief to which they refer discusses the numerous public construction projects on which project labor agreements have been used in the past. The sentence on which respondents rely then states: "Governmental agencies responsible for these projects, and the private contractors who perform the work, have formed the judgment that such agreements may sometimes help to ensure labor peace and stability, an available labor supply, and timely completion of major construction projects that further substantial public purposes." U.S. Amicus Br. 29. The point of the quoted clause was that the projects mentioned "further substantial public purposes." We did not argue that project labor agreements invariably further substantial public purposes,

as respondents' selective quotation implies. On that issue, we made the more limited point that governmental agencies and private contractors have concluded that such agreements "sometimes help" to ensure labor peace and stability, an available labor supply, and timely completion of the projects.

Executive Order No. 12,818 has no effect on our legal submission in this case. The National Labor Relations Act does not preempt state and local governments from choosing to utilize project labor agreements on their construction projects to advance legitimate proprietary concerns. MWRA therefore was free under that Act to decide whether the perceived advantages of a project labor agreement outweighed the disadvantages of such an agreement. It is irrelevant whether another governmental entity might have reached a different conclusion.

For the foregoing reasons and those stated in our principal brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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